

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 13, 2009

STATE OF TENNESSEE v. JASON GLEN LEFAN

Direct Appeal from the Criminal Court for Davidson County
No. 2008-B-1501 J. Randall Wyatt, Jr., Judge

No. M2008-02082-CCA-R3-CD - Filed July 1, 2009

The defendant, Jason Glen Lefan, pled guilty to aggravated burglary, a Class C felony; theft of property over \$1000, a Class D felony; and harassment, a Class A misdemeanor, and was sentenced to an effective term of five years on supervised probation. On appeal, the defendant argues that the trial court erred in denying his request for judicial diversion. Upon review, we affirm the trial court's denial of judicial diversion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Emma Rae Tennent (on appeal) and Tyler Chance Yarbrow (at trial), Assistant Public Defenders, for the appellant, Jason Glen Lefan.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy Eisenbeck, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The defendant was indicted on two counts of aggravated burglary, one count of theft of property over \$1000, and one count of harassment, arising out of an encounter with his ex-girlfriend. On July 3, 2008, the defendant pled guilty to one count of aggravated burglary in exchange for a five-year sentence; theft over \$1000 in exchange for a two-year sentence; and harassment in exchange for a sentence of eleven months, twenty-nine days. The second count of aggravated burglary was dismissed. The sentences were to be served concurrently on supervised probation with the defendant's suitability for judicial diversion to be determined after a hearing.

The factual basis for the defendant's guilty pleas was as follows:

[T]he [S]tate's proof would have shown that on January 10th 2008, at about six in the evening, the defendant broke into the victim's residence which is here in Davidson County by smashing the door open and breaking the door frame. The defendant and the victim became involved in a verbal argument that turned physical. He, then, grabbed the victim by her arms and said you're coming with me, and I'm going to beat the blank out of you. The defendant, then, threw the victim to the floor and she was able to defend herself by spraying the defendant with chemical spray. The defendant then grabbed her laptop and said I'll see what you've been up to and then he left the scene on foot.

She came to the police station where she got a warrant against the defendant for the aggravated burglary. Once she got home, she found that her residence had been broken into again and she reported that two bags of clothes and personal items were missing along with a power adaptor to the stolen laptop computer.

On January 13th [2008], the defendant was arrested on an outstanding warrant and the vehicle that he was in was towed to the tow-in lot. Police officers were able to get a search warrant for his vehicle and a search of that vehicle revealed the stolen computer and the adaptor. The victim noted that her personal information was in her computer, including her new phone number and prior to the defendant stealing her computer [he] didn't have her new phone number. Since then he had called her cell several times. He also left her some text messages.

At the diversion hearing, the thirty-two-year-old defendant testified that he currently lived with his mother in Kentucky where he moved to "receive help, mental help, drug rehabilitation help, and to get away from Nashville." The defendant said he was a recording engineer by trade but was currently not working due to a hearing condition and mental health problems. He said he was scheduled to undergo ear surgery and hoped to return to work when able. Other than his hearing condition, the defendant was in good physical health.

The defendant said he first realized that he had mental health problems about a month after the incident in this case. After coming to that realization, he "attended three different mental health facilities" in an effort "to get [his] head straight on medication that can help [him] and just try to find [his] life again." He had not been able to receive treatment in the last six weeks because of an insurance matter but ordinarily received weekly treatment. The defendant said he had been diagnosed with severe depression, schizophrenia, and bi-polar disorder. He intended to stay in Kentucky and continue treatment until he got back on his feet.

The defendant testified that he had been sober since February 12, 2008, when he realized that drugs had ruined his life. He said that he accepted responsibility for what happened with the victim and that he was "[r]emorseful. It was a glitch in time to where [he] . . . was just a different person."

He said he understood that he needed to stay away from the victim and had no desire to have contact with her.

On cross-examination, the defendant testified that he had not been drinking or using cocaine or marijuana the day of the incident. He knew that the victim did not want him in her house, but he broke down the door with his shoulder because he had “just been called impossible and ignorant [a]nd [he] just saw red.” He admitted that he grabbed the victim because he thought she was going to hit him, but he denied telling the victim, “[Y]ou’re coming with me[.]” He testified that, instead, he told the victim that he “should beat the shit out of her” when she was on the ground. The victim then sprayed him with pepper spray, so he grabbed the laptop computer and left.

The defendant testified that he took the laptop because “that’s kind of a gray area of what I consider half mine.” He denied saying that he was going to see what she had been up to when he left with the laptop. He said that he did not go back to the victim’s residence a second time while she was away. The defendant stated that he learned the victim’s new phone number from friends. He said that the notation in his presentence report that he did not quit using marijuana until July 2008 was a miscommunication because he had been sober since February 12, 2008. The defendant admitted that before he became sober, he drank eight to ten alcoholic drinks a day, used marijuana twice a day, used cocaine twice a week, and had used hallucinogens such as LSD and mushrooms since the age of eighteen.

The victim testified that she had dated the defendant for eight years, seven of which they lived together. In June 2007, she decided to break up with the defendant but tried to preserve a friendship with him. However, toward the end of December 2007, the victim attempted to cut off all contact with the defendant because he was following her and trying to keep track of her activities. The victim changed her phone number, but the defendant still knew where she worked and lived.

On January 5, 2008, the defendant came to the victim’s house, and she let him in because she saw his mother in the car. They had a calm discussion, and the victim felt they could move on with their lives. However, when the victim arrived at work on January 10, she had a message from the defendant on her voice mail in which he said “some very mean things” and called her a “whore.” In response, the victim filed a stalking report, having realized that the defendant was not going to leave her alone.

After work that day, the victim went home and was standing outside when she saw the defendant approach. She ran inside, locked the door, and called 911. After completing the call, she talked to the defendant through the door and asked him to leave. At some point, the defendant broke down the door and advanced on the victim, calling her a “whore” and a “terrible person.” He grabbed her, pushed her to the ground, and threatened to “beat the shit out of [her].” He also told her that “[she] was coming with him.” During the altercation, the defendant kept reaching for the “bulging” pocket of his cargo pants. Remembering that she had mace on her key chain, the victim made her way to her keys and sprayed the defendant. The defendant left, taking her laptop with him.

The victim went to the police station “to file a warrant” and then returned home to gather some belongings in order to stay at a friend’s house. The victim found her door ajar and noticed that the overnight bags she had assembled earlier were missing. The following day, she received phone calls and text messages from the defendant. She recalled that one message “was something like let the gunshot that you never heard ring in your head forever.” He also left her a voice mail saying that he was going to Pensacola, where they fell in love, to kill himself and that it was all her fault.

The victim stated that she had a lingering sense of fear and was paranoid of her surroundings. She planned to move away from Nashville. She said she did not support judicial diversion for the defendant because of the irreversible emotional, mental, and financial impact his actions have caused her. On cross-examination, the victim acknowledged that the laptop was returned to her, but her clothes were not.

ANALYSIS

On appeal, the defendant argues that the trial court erred in denying his request for judicial diversion. Specifically, he argues that “the trial court placed undue emphasis on its concerns about deterrence and the circumstances of [f] the offense, to the exclusion of other pertinent factors.” Tennessee Code Annotated section 40-35-313 provides that, following a determination of guilt by plea or by trial, a trial court may, in its discretion, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. Tenn. Code Ann. § 40-35-313(a)(1)(A) (2006). A qualified defendant is one who is found guilty or pleads guilty or nolo contendere to a misdemeanor or Class C, D, or E felony; has not been previously convicted of a felony or a Class A misdemeanor; and who is not seeking deferral for a sexual offense, a violation of Tennessee Code Annotated sections 71-6-117 or 71-6-119, or a Class A or B felony. *Id.* § 40-35-313(a)(1)(B)(i). If the defendant successfully completes the period of probation, the trial court is required to dismiss the proceedings against him, and the defendant may have the records of the proceedings expunged. *Id.* § 40-35-313(a)(2), (b).

The decision to grant or deny a qualified defendant judicial diversion lies within the sound discretion of the trial court. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); State v. Cutshaw, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997); State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). As such, it will not be disturbed on appeal absent an abuse of discretion. Electroplating, 990 S.W.2d at 229; Cutshaw, 967 S.W.2d at 344; Bonestel, 871 S.W.2d at 168. To constitute an abuse of discretion, the record must be devoid of any substantial evidence in support of the trial court’s decision. Cutshaw, 967 S.W.2d at 344; Bonestel, 871 S.W.2d at 168; State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992).

In determining whether to grant diversion, the trial court considers (a) the accused’s amenability to correction, (b) the circumstances of the offense, (c) the accused’s criminal record, (d) the accused’s social history, (e) the accused’s physical and mental health, (f) the deterrence value to the accused as well as others, and (g) whether judicial diversion will serve the interests of the

public as well as the accused. Electroplating, 990 S.W.2d at 229; Bonestel, 871 S.W.2d at 168. A trial court should not deny judicial diversion without explaining the factors in support of its denial and how those factors outweigh other factors in favor of diversion. Electroplating, 990 S.W.2d at 229. In State v. Curry, a pretrial diversion case, our supreme court held that the circumstances of the offense and the need for deterrence may alone justify a denial of diversion, but only if all of the relevant factors have been considered as well. 988 S.W.2d 153, 158 (Tenn. 1999). “[J]udicial diversion is similar in purpose to pretrial diversion and is to be imposed within the discretion of the trial court subject only to the same constraints applicable to prosecutors in applying pretrial diversion under [Tennessee Code Annotated section] 40-15-105.” Anderson, 857 S.W.2d at 572.

In rendering its verbal denial of diversion, the trial court noted the defendant had a history of drug and alcohol use and mental health issues, but acknowledged with approval that the defendant was receiving treatment and presently doing well. However, the court considered that the defendant had the potential to “go[] off the tracks again” and said that it could not “find with the history that I’ve read about him and the treatment that he’s gotten in Kentucky and all of the other things, that this is something that just happened on the spur of the moment, and . . . will never happen again.” The court recognized that the defendant was “close to” being a first-time offender. The court was particularly concerned with the impact of the incident on the victim and observed that she was living her life in fear. In its written order, the court additionally noted that the defendant was remorseful for his actions and hopeful to restore his employment status and lifestyle. The court concluded that the seriousness of the crime and the nature of the defendant’s mental and substance abuse problems necessitated the denial of diversion. The court also alluded to the deterrent value to the defendant by noting that “the world should be on notice of these problems should his attempted recovery be unsuccessful.”

Although the trial court did not enumerate the Electroplating factors or explicitly state the weight it was applying to each factor, its findings implicitly show the weight it applied and evince a knowledge of the factors it was to consider. Moreover, the court rendered its verbal findings soon after defense counsel recited the factors the court was to consider in determining whether to grant judicial diversion. The court acknowledged a number of actions and attributes of the defendant favorable to the grant of diversion, including that he was in treatment, had moved from the area, had familial support, and had very little criminal record. However, the record reflects that the trial court was primarily concerned with the circumstances of the offenses in that the defendant “busted down the door, push[ed] her to the floor” and then “call[ed] her, saying all of these things, going to Pensacola, suicide[.]” The record shows that the court also based its denial on the defendant’s mental health issues, extensive use of drugs and alcohol, and the deterrence value to the defendant in the event his treatment was unsuccessful.

Substantial evidence in the record supports the trial court’s denial of diversion. The record reflects that the offenses were indeed serious – the defendant broke down the door to the victim’s home while she was inside, grabbed her and said he “should beat the shit out of her,” and later left her threatening phone messages. As a result of the incident, the victim planned to move from Nashville because of a lingering sense of fear and insecurity. In the victim impact statement, the

victim relayed that she had to move from the apartment where the incident occurred and now kept mace in every room of her home and owned a taser and handgun. The presentence report shows that the defendant started using marijuana and alcohol at the age of twelve and cocaine and hallucinogens at the age of seventeen and eighteen, respectively. The presentence report also shows that the defendant reported to have completed drug and alcohol treatment programs at the ages of eighteen and twenty-one, yet his use continued until after the incident in this case. At the hearing, the defendant testified that he had been sober since February 12, 2008, but the presentence report reflects that he smoked marijuana daily until July 3, 2008 – a discrepancy he attributed to “miscommunication.” In sum, we cannot conclude that the trial court abused its discretion.

CONCLUSION

Based on the aforementioned authorities and reasoning, we affirm the trial court’s denial of judicial diversion.

ALAN E. GLENN, JUDGE